



U.S. SENATE COMMITTEE ON

# Finance

SENATOR CHUCK GRASSLEY, OF IOWA - CHAIRMAN

<http://finance.senate.gov>

## MEMORANDUM

To: Reporters and Editors  
Re: Medicare billing questions, fraud  
Da: Tuesday, Sept. 28, 2004

Sen. Chuck Grassley, chairman of the Committee on Finance, made the following comment in response to an American Medical Association editorial opining that doctors are vulnerable to prosecution for honest mistakes under the False Claims Act. The AMA issued its editorial after the Government Accountability Office concluded that a Medicare call center program often gives bad advice. Grassley is the Senate author of the 1986 whistleblower amendments strengthening the False Claims Act.

“It’s unacceptable for Medicare call centers to give incorrect billing information. That has terrible implications for whether taxpayers are paying correctly for services rendered, and whether doctors are receiving correct payments for those services. But that’s a very different issue from whether doctors are being prosecuted for ‘honest mistakes’ under the False Claims Act. We heard that argument years ago, when some health care providers persuaded certain members of Congress to try to weaken the False Claims Act, yet those providers couldn’t provide examples of prosecutions for honest mistakes. It’s no wonder. Prosecutors have full discretion over which cases to pursue, and the standard of proof for a false claim against the government is tough. Under the law, the government has the burden of proving a false claim has been submitted ‘knowingly.’ Prosecutors simply don’t go after doctors for making inadvertent billing errors. Actual False Claims Act cases have involved real, blatant fraud, not honest mistakes. The cases have stopped labs that billed Medicare for tests never ordered, and a drug company that inflated the price of cancer drugs reported to the government. The False Claims Act has returned more than \$12 billion to the federal treasury since 1986. I don’t want to see a resurgence of attempts to weaken this critical fraud-fighting tool in the name of ‘honest mistakes.’ ”

The editorial from the American Medical Association follows, along with a statement from Taxpayers Against Fraud.

<http://www.ama-assn.org/amednews/2004/10/04/edsa1004.htm>

Medicare's no-help line: Doctors not getting good answers

A report saying Medicare carrier call centers rarely give the correct answer to billing questions highlights the need for Congress to protect physicians from overzealous fraud investigators.

Editorial. Oct. 4, 2004.

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For years, the AMA has called on Congress to halt abusive enforcement practices by the federal government and refocus its investigations to traditional definitions of fraud rather than inadvertent billing errors. Although the Centers for Medicare & Medicaid Services has assured physicians that their confusion over billing is not a major target for Medicare fraud investigations, honest mistakes are still actionable under the False Claims Act and subject to a civil monetary penalty.

So when it's time for physicians to bill Medicare, it would make sense to clear up any confusion by contacting Medicare call centers to ask for advice, lest a miscoded claim be construed as fraud. Except that, according to a Government Accountability Office study, physicians have only a 4% chance of getting a correct and complete response to their question.

That means 96% of time -- as happened when the GAO ran 300 test calls posing four questions on Medicare billing -- customer service representatives gave answers that were incomplete, only partially correct or completely wrong. That last category -- completely wrong -- made up half of those botched answers, according to the GAO.

Not that this is a new problem. A similar survey two years ago put the correct-answer rate at 15%, which looks downright reliable compared with the current 4%. No wonder AMA Board of Trustees Chair J. James Rohack, MD, responded to the news by saying, "While the Medicare call centers' inability to correctly answer physicians' questions is troubling, sadly, it is not surprising."

Dr. Rohack, in his response to the GAO report, added it "confirms longstanding complaints from physicians about the lack of clear and reliable guidance on complex Medicare policy questions."

In response to the GAO report, CMS says it is going to take some steps to improve its call centers. One such move the CMS plans is to create a triage-like system that would allow customer service representatives to transfer billing questions to a supervisor or a more experienced call-taker. Another move the CMS says it plans is to create a searchable database that customer service representatives can use to find the exact answer to a physician's question, rather than, as often happens, giving a generic response to a complicated query.

While it's laudable that CMS intends to work on these problems, the agency's move would not address the culture of fear that has physicians calling Medicare to make sure they're not unwittingly committing a fraudulent act. Nor, as some consultants say, does it speak to the exasperation from phone system hassles that have physicians not calling Medicare and hoping they didn't unwittingly commit fraud.

Doing away with the culture of fear would require Congress passing a measure that would allow physicians to be exempt from civil penalties if there is no evidence of fraud, or if the physician was given incorrect guidance from CMS. A bill, S 1332, that does just those things is in committee. Intentional and willful fraud is a terrible thing, but it is different than a physician unintentionally miscoding a form.

It's enough of a hassle for physician to have to take time out to call an insurer to check on billing. It's an even bigger hassle, one that veers well into the absurd, when that insurer is almost incapable

of giving a precise answer to a physician's question. And it goes beyond hassle and into a threat to livelihood when the inability to give a precise answer could end up getting a physician under federal investigation.

Physicians need protection to make sure an innocent mistake, and an incorrect answer, doesn't turn into a case of fraud.

**CONTACT: James Moorman, TAF, 202-296-4826 ext 22**

Patrick Burns, 202-296-4826 ext 24 (PBurns@taf.org)

*September 28, 2004*

## **AMA News Stumbles While Exposing Gaffs**

An October 4 editorial by the AMA News managed to get both the law and the facts wrong – which is ironic since their core point was that the Center for Medicare and Medicaid Services (CMS) rarely gets it right when complex questions are directed at harried 1-800 Help Line operators. Unlike the staff at the CMS call center, however, the editorial staff at the AMA News had all the time in the world to get it right.

AMA News editors claim, "honest mistakes are actionable under the False Claims Act and subject to a civil monetary penalty." This is not true. Mistakes are exempt from prosecution under the False Claims Act. The law applies only when a fraud-feasor knows it is committing fraud, or when it acts in deliberate ignorance or in reckless disregard of the truth.

The editors of the AM News also suggest that physicians are being targeted under the False Claim Act. This is also untrue. Of all the False Claims Act cases settled by the U.S. Department of Justice in FY 2004, only four were directed at individual doctors (out of 700,000 physicians nationwide), and all four cases were examples of gross abuses of the Medicare and Medicaid system – not "honest mistakes," as the AMA suggests.

Notes Jim Moorman, President of Taxpayers Against Fraud, a nonprofit consumer group working to reduce fraud against the Federal Government, "I would like to think this was an honest mistake on the part of the AMA, and not a deliberate misrepresentation of the False Claims Act. At a time when billions of dollars a year are being stolen from Medicare and Medicaid, our hope is that the AMA would be a leader of physicians fighting fraud rather than an apologist for anyone engaged in fraud."

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**Taxpayers Against Fraud Education Fund** is a nonprofit, public interest organization dedicated to combating fraud against the Federal Government through the promotion and use of the Federal False Claims Act and its qui tam provisions. For further information, visit our web

site at: [www.taf.org](http://www.taf.org)